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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

HEESoon E. KIM,

Plaintiff and Respondent,

v.

MARGARET J. WESTON et al.,

Defendants and Appellants.

B201424

(Los Angeles County
Super. Ct. No. YC053749)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lois A. Smaltz, Judge. Affirmed in part; reversed in part.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, and Allison A. Arabian; Law Offices of E. Leonard Fruchter and E. Leonard Fruchter for Defendants and Appellants.

Law Offices of Bennett A. Rheingold and Bennett A. Rheingold for Plaintiff and Respondent.

Heesoon E. Kim (plaintiff) filed a lawsuit against Margaret J. Weston and Patrick J. Weston (referred to collectively as defendants, individually as Peggy and Patrick, as they were referred to at trial) for negligence, nuisance, and intentional infliction of emotional distress. Following a one-day court trial, judgment was entered against defendants for \$60,000 in emotional distress damages, \$30,000 in punitive damages, \$3,150 in actual damages, and costs of \$987.55. Defendants appeal, contending that there is insufficient evidence to support the nuisance claim, the award of damages for emotional distress, and the award of punitive damages. We reverse the punitive damage award and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the owner of a condominium in a two-unit building in Redondo Beach. Defendants purchased the other unit in 2002 and leased it to their relatives.

Plaintiff testified that her front balcony shares a wall with defendants' back balcony. In August 2003, plaintiff obtained termite inspections and reports from three companies. The inspections revealed visible termite damage in the living area, the garage, and the balcony. All of the companies concluded that local treatment would not be effective and that the only way to eradicate the termites would be to tent and fumigate the entire building, including defendants' unit, with vikane gas. At that time, plaintiff elected to have local or spot treatment, which consisted of the drilling of holes and injection of chemicals, in the master bedroom and a bathroom.

In September 2003, plaintiff called defendants to request that both properties be inspected. Plaintiff suggested that if the inspections revealed the presence of termites, as she suspected, that the parties consider fumigation. Peggy firmly denied that her side of the property was termite-infested and said she was not interested in fumigating her house.

In September 2004, after seeing termites swarming in her unit, plaintiff contacted Peggy and asked her to reconsider fumigation. Peggy said she would discuss the matter with her husband and the tenants in the unit and get back to her. When plaintiff did not

hear from either defendant, she wrote Peggy a letter in October. She informed her that the termite infestation was substantial and the condition caused her family distress. Plaintiff wrote that she had been advised by termite companies that fumigation was the only effective option. She again suggested that the parties have their homes inspected and receive a recommendation for treatment. In closing, she asked defendants to respond by October 30.

On October 30, Peggy called plaintiff. She said that she was going out of town and would contact plaintiff upon her return around the week of November 19. After receiving no further word from defendants, plaintiff sent another letter on December 14. She stated she wanted to settle the matter amicably, but warned that if defendants chose to ignore the problem she would be forced to take legal action. When defendants did not respond to the December letter, plaintiff retained counsel.

In January 2005, plaintiff's attorney wrote to defendants. He reiterated that fumigation was the only effective method of treatment. He wrote that plaintiff was concerned with the structural damage to her condominium caused by the termites. He asked that defendants cooperate in having the units inspected and treated.

In March 2005, plaintiff's attorney sent another letter. According to that letter, defendants had called plaintiff immediately after their receipt of the January letter to inform her that a termite inspection was being performed. Counsel requested a copy of the report, noting that plaintiff had made several phone calls seeking the results of the inspection to no avail.

Defendants had a termite inspection performed on their unit in March 2005, but they did not send a copy of the report to plaintiff's attorney until May. Despite the inspector's recommendation that the unit be fumigated, Peggy told plaintiff that their home required only local treatment on one side of the property. When plaintiff asked for the name of the company that had inspected defendants' unit, Peggy said that Patrick would provide that information. He did not.

In April 2005, plaintiff's attorney wrote to defendants, informing them that plaintiff was willing to pay for the fumigation as long as it was performed by June 11.

Patrick contacted plaintiff's attorney and asked for a one-month extension of the performance date, which was granted.

By July 2005, the matter was still not resolved. Plaintiff went to the South Bay Center, Dispute Resolution, to seek its help. The Center discussed the situation with the parties and attempted to set up a mediation session, but defendants were unresponsive to repeated efforts to do so. The Center closed its file in March 2006.

In March 2006, plaintiff retained a new attorney, Bennett Rheingold. In April 2006, Peggy called Rheingold and said defendants' unit would be vacated by June and available for fumigation. In June, Peggy told Rheingold the unit would not be vacant after all. Rheingold wrote that plaintiff was willing to delay the filing of her complaint if fumigation of defendants' property could be performed by July 13. On July 13, Peggy left a message for Rheingold stating that she would call when she had further information as to when the unit would be available for fumigation.

On July 27, 2006, Rheingold sent Peggy a courtesy copy of plaintiff's proposed complaint. He warned that the suit would be filed if defendants were unwilling to provide a firm date for fumigation to begin. In response, on August 22, defendants' attorney wrote that they were willing to make their property available for fumigation on or about February 1, 2007, on condition that plaintiff pay for fumigation, all expenses incurred in eliminating any trace of chemical left in the property, and a minimum 10-day stay for defendants' tenants at a three-star hotel.

On August 23, 2006, this suit was filed.

In December 2006, after obtaining a preliminary injunction and a court order, plaintiff was able to have the two adjoining units fumigated. She paid the cost of \$3,150.

Plaintiff testified to the scope of the termite infestation and the effect it had on her and her family. Twice a year during a two-to-four-week period in March and September, the termites would swarm inside and outside of plaintiff's home. In September 2005, she received a phone call from her children. They were panic stricken because there were termites all over the kitchen sink. Plaintiff tried to get the tenants next door, Peggy's brother and sister-in-law, to look at the termite activity in the hope that they would tell

Peggy the extent of the problem, but they refused. Plaintiff took pictures of the termites in the sink and the swarming activity in March and September of 2006. They were admitted into evidence.

During the six swarming periods plaintiff and her family endured from March 2004 to September 2006, they were required to spend each day cleaning up dead and flying termites. This distressed plaintiff, as she had a visual reminder that her home was being destroyed by termites. She was unable to sleep. Her children were upset. The two older children understood the damage termites could inflict and asked if the house was going to fall. Plaintiff had to console and comfort her children as she attempted to assure them that the problem would be resolved. However, she knew that the only way to take care of the problem was to fumigate and she was at defendants' mercy, which caused her to feel angry, frustrated, and helpless.

Plaintiff testified that she explored various alternatives for treatment. Initially, she opted for spot treatment, but the termites returned. Peggy never explained to her why fumigation was not an option; she merely denied that there was a termite problem on her side of the property. In September 2004, Peggy suggested looking into heat treatment, but the companies that performed the service told plaintiff it was not a viable option.

Plaintiff's 15-year-old son testified about the infestation during the three-year period. When he came home from school, dead and live termites were all over the floor, on the stairs, and in the bathroom. He lost sleep thinking about the termites and was afraid to move around the house. He was angry that the problem could not be resolved and had to comfort his younger sister who was always worried about the termites.

Yun Sup Koo, the person who inspected and fumigated the two units, testified about the damage to plaintiff's house and the method of fumigation. After inspecting the two properties, he concluded that fumigation was the only reasonable treatment of the infestation. He could not fumigate only plaintiff's unit because gas would leak into the adjoining unit owned by defendants. Mr. Koo stated that after the fumigation was performed, he inspected defendants' property and determined that the termite infestation

there was as bad as that in plaintiff's unit. In the three years from 2003 to 2006, the extent of the damage in plaintiff's unit had progressed from "minor" to "major."

Peggy testified that her unit was inspected for termites when she purchased it in November 2002. After plaintiff complained about the termites, defendants contacted a termite company. The termite company's report was received into evidence for the purpose of showing that defendants were aware their unit had termite damage. Peggy stated that she offered to seek other kinds of treatment, but plaintiff would not agree to any other option. She said her tenants have allergies and she was concerned that fumigation would affect them. She was seeking another way to have the property treated. She could not state, however, that her tenants were allergic to vikane gas. She testified that based upon her experience as a property owner for many years, fumigation does not eradicate all termites. She stated she owned about 20 properties, including apartment complexes. She had utilized heat treatment and orange oil treatment for termite eradication at her other properties, so she assumed plaintiff was looking into all options.

After taking the matter under submission, the court entered judgment for plaintiff. The judgment stated, inter alia: "Plaintiff has proven by a preponderance of the evidence that defendants were negligent in failing and refusing to permit simultaneous fumigation of the two units [¶] . . . [T]he only credible testimony [that the problem could have been treated by less intrusive means] was from David Koo, who explained that plaintiff's unit could not be effectively treated by tenting with vikane gas without also tenting defendants' adjoining unit. . . . Defendant's proffered empirical evidence [on other types of treatment] was insufficient to controvert the opinion of Mr. Koo [¶] . . . Defendants having offered no competent evidence to support [the claim of their tenants' allergies], the argument is rejected. . . . [¶] Defendants' refusal to cooperate under these conditions was outrageous. Moreover, defendants acted with reckless disregard of the probability that plaintiff would suffer emotional distress as a result of the effect on her children and her property during the unreasonably extended period of obvious termite infestation in her home. [¶] . . . [¶] Defendants' continued refusals were also outrageous in view of plaintiff's proactive attempts to remediate the harm being done to

herself, her family and her home. . . . Defendants knew that plaintiff would continue to suffer emotional distress until the termites were eradicated. Defendants' persistent and unreasonable refusal to permit the necessary fumigation, resulting in unnecessarily prolonged exposure of plaintiff, her family and her property to visible and insidious termite infestation, was outrageous. . . . [¶] . . . Intolerable living conditions resulted from the infestation of termites in plaintiff's home In refusing to permit this fumigation, the defendants prevented plaintiff's comfortable use and enjoyment of her unit. The seasonal swarming of flying termites inside the home, and the knowledge all year long that living termites were destroying the wood floors and baseboards in the home, were conditions that would be offensive to the senses of any ordinary person. [¶] The maintenance of this nuisance caused plaintiff to suffer substantial harm in the form of economic damage to her property and severe emotional distress. . . . [¶] Plaintiff also seeks an award of punitive damages. The court finds, by clear and convincing evidence, that defendants' conduct was malicious and oppressive, and in willful and knowing disregard of the rights and safety of plaintiff and her family."

Defendants' motions for judgment notwithstanding the verdict and new trial were denied.

DISCUSSION

I. The Negligence Cause of Action

Although defendants assert the evidence is insufficient to establish that they were negligent, they do not discuss the elements of negligence or explain how plaintiff failed to meet her burden of proof. Defendants have the burden of affirmatively demonstrating error through reasoned argument and discussion of legal authority. "Simply hinting at an argument and leaving it to the appellate court to develop it is not adequate." (*Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633.) Thus, we do not disturb the court's finding on the negligence cause of action.

II. The Nuisance Cause of Action

Defendants contend that they can have no liability under a nuisance theory because the termite infestation was a natural condition that they did not cause. They argue further that they had a right to refuse to fumigate their property.

A nuisance is “[a]nything which is injurious to health, . . . indecent or offensive to the senses, or an obstruction to the free use of property . . .” (Civ. Code, § 3479.) “In California, a broad statutory definition of nuisance appears to embrace nearly any type of interference with the enjoyment of property. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 919.)” (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 585.) A nuisance action may be maintained by “any person whose property is injuriously affected, or whose personal enjoyment is lessened.” (Code Civ. Proc., § 731.) In order to establish a nuisance cause of action, the following elements must be proven: (1) an interference with the plaintiff’s use and enjoyment of his or her property; (2) the interference was substantial, that is, it caused substantial actual damage; and (3) the interference was unreasonable. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937-938.)

“““Damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort . . .” [Citations.] “[M]ental distress caused by the nuisance created and maintained by the defendant is an element of loss of enjoyment. [Citations.]”” (*Lew v. Superior Court* (1993) 20 Cal.App.4th 866, 874.)

Defendants do not dispute that plaintiff established the termite infestation interfered with the use and enjoyment of her property other than to say that “no published decision in California holds that the presence of termites in a dwelling constitutes a nuisance.” No one can seriously dispute that a biannual invasion of flying termites into one’s home meets the broad definition of a type of interference with the enjoyment of property. (See *Stoiber v. Honeychuck*, *supra*, 101 Cal.App.3d at p. 919.)

As to whether the interference was substantial, “[t]he degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of

normal health and sensibilities living in the same community? [Citation.] ‘If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncracies of the particular plaintiff may make it unendurable to him.’ (Rest.2d Torts, § 821F, com. d, p. 106.) This is, of course, a question of fact that turns on the circumstances of each case.” (*San Diego Gas & Electric Co. v. Superior Court, supra*, 13 Cal.4th at p. 938.)

We believe the trial court was correct when it concluded that “[t]he seasonal swarming of flying termites inside the home, and the knowledge all year long that living termites were destroying the wood floors and baseboards in the home, were conditions that would be offensive to the senses of any ordinary person.” Again, defendants cannot seriously quarrel with that conclusion.

We come to the final element of a nuisance action. Was the interference unreasonable? “The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant’s conduct, taking a number of factors into account. [Citation.] Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but ‘whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.’ [Citation.] And again this is a question of fact: ‘Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.’ ([Rest.2d Torts § 826], com. b, p. 120)” (*San Diego Gas & Electric Co. v. Superior Court, supra*, 13 Cal.4th at pp. 938-939.)

The trial court made the following findings. Fumigation of the two units was the only effective method of abating the termite problem. (Indeed, Peggy Weston admitted at trial that she and her husband had obtained an independent termite inspection report which recommended that their unit be fumigated.) Over a period of three years after plaintiff advised defendants of the existence of termites, they refused to allow testing of their unit or fumigation. Despite repeated requests from plaintiff that the parties attempt to resolve the problem, defendants “offered no reasonable explanation for their refusal to

permit the fumigation in order to kill termites that were undeniably causing continuing damage inside plaintiff's unit." Defendants do not dispute those findings. Weighing the nature of the harm to plaintiff and the social utility of defendants' decision to simply ignore their neighbor's plight, we have little difficulty concluding that the interference with plaintiff's enjoyment of her property was unreasonable.

Defendants launch two legal claims. They argue that "[f]or nuisance liability to attach, [their] activity must be the proximate cause of the unreasonable interference." They assert that because they did not cause the termite infestation, they cannot be held responsible on a nuisance theory. We are not persuaded.

The trial court did not sustain plaintiff's nuisance claim because defendants caused the termite infestation, and we agree that under these facts, it could not do so. Defendants were found liable because their unreasonable refusal to allow fumigation, the only effective means of eradicating the pests, resulted in "[i]ntolerable living conditions," and "prevented plaintiff's comfortable use and enjoyment of her unit. In other words, defendants' inaction allowed a condition which could have been remediated to exist unabated. The fact that defendants' misconduct was the result of an omission rather than an affirmative act does not preclude nuisance liability. (*Stoiber v. Honeychuck, supra*, 101 Cal.App.3d at p. 920.)

Defendants contend that they had the right to resist fumigation of their own property. Citing *Lamden v. La Jolla Shores Condominium Homeowners Assn.* (1999) 21 Cal.4th 249, 270 (*Lamden*), they urge there is no legal duty mandating any particular method of termite treatment. Their argument misses the mark.

In *Lamden*, an owner of a condominium discovered her unit, which had been spot treated, was termite-infested. After she and the condominium association received termite inspection reports recommending fumigation, the association board considered and rejected that approach, deciding instead to rely on secondary treatment. The owner filed suit, alleging that the association, in opting not to fumigate, breached its statutory duty to maintain the common areas of the development. (*Lamden, supra*, 21 Cal.4th at pp. 254-255.) The Supreme Court held, "Where a duly constituted community

association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Id.* at p. 253.)

Contrary to defendants' position, *Lamden* did not discuss an *individual's* right to refuse certain termite treatment. More to the point, ours is not a situation where the parties' dispute arose over a disagreement concerning the appropriate method of termite treatment. There is no evidence defendants suggested an alternative solution to the problem. As we have discussed, although defendants knew plaintiff's property was infested and despite three years of pleading on plaintiff's part, defendants simply refused to allow fumigation despite their clear knowledge that the termite infestation was interfering with plaintiff's enjoyment of her property.¹

III. Emotional Distress Damages

Defendants contend that plaintiff is not entitled to emotional distress damages on her nuisance claim. They allege that since she did not specifically request such damages in her pleading with respect to the nuisance cause of action, the court had no jurisdiction to award them. They are incorrect. "[I]t is fundamental that after trial on the merits, the court may afford any form of relief supported by the evidence and as to which the parties were on notice, whether requested in the pleadings or not." (*American Motorists Ins. Co. v. Cowan* (1982) 127 Cal.App.3d 875, 883.) There can be no dispute that defendants were aware that plaintiff was seeking damages for emotional distress, albeit under a different theory.

¹ As plaintiff had a right to recover emotional distress damages based on her nuisance claim (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 337), we need not determine whether the evidence is sufficient to support her intentional infliction allegation.

Defendants claim that plaintiff did not suffer emotional distress, or if she did, her distress was mild. They argue that because she endured no physical manifestations of distress or saw a doctor, the award cannot be sustained. Of course, physical injury is not required. “[R]egardless of whether the occupant of land has sustained physical injury, [s]he may recover damages for the discomfort and annoyance of [herself] and [her] family and for mental suffering occasioned by fear for the safety of [herself] and [her] family when such discomfort or suffering has been proximately caused by a trespass or a nuisance.” (*Acadia, California, Ltd. v. Herbert, supra*, 54 Cal.2d at p. 337.) Defendants’ basic premise is termites, like any other pest, are a problem that must be endured and that never could cause severe emotional distress. The case they cite, *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376 (*Fletcher*), illustrates the flaw in their argument.

In *Fletcher*, the defendants argued that the plaintiff’s testimony established that at most he was only mildly upset by their conduct. The appellate court concluded: “The jury and the trial judge, who denied the motion for judgment notwithstanding the verdict, observed plaintiff and heard his testimony and were, as a result, in a far better position than we to judge the severity of plaintiff’s emotional distress. It is true that plaintiff’s testimony did not indicate that he suffered any traumatic emotional distress of the character of shock, horror or nausea, but the requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry. [Citations.]” (*Fletcher, supra*, 10 Cal.App.3d at p. 397.) The court found that the plaintiff’s testimony that he was frightened, worried, and upset by the defendants’ intentional misrepresentations, coupled with the evidence that plaintiff’s worry and anxiety persisted for many months, supported the finding of substantial emotional distress. (*Id.* at pp. 397-398.)

So it is here. Plaintiff testified that she was upset and worried about the termite infestation in her home. For three years, she endured periods of swarming termites, dealt with her children’s fears and insecurities, worried that her home was being destroyed, and experienced anger and frustration because she knew there was nothing she could do to

ameliorate the situation. With the return of the swarm of termites in March and September, she was reminded of the hopelessness of her position. As in *Fletcher*, the trial court was in a better position to judge the measure of plaintiff's emotional distress than we are. We will not second-guess its determination, as it is supported by substantial evidence.

Defendants also attack the amount of the award. "We must reverse or reduce an award of compensatory damages if the defendant shows that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based on prejudice or passion. [Citation.]" (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 807.) We have discussed plaintiff's three-year quest to eradicate the termites, and while we understand how one might quarrel with the amount of the award, we cannot say that it is grossly disproportionate to any reasonable view of the evidence.

We will not disturb the award of damages for emotional distress.

IV. Punitive Damages

Defendants contend that there was no evidence about their financial condition and the punitive damage award must be reversed. We agree that although Peggy admitted to owning several rental properties, there was no evidence about the value of these properties, the amount of income they generated, the extent to which they were encumbered, or whether they were operated at a profit. Thus, the record is insufficient for this court to evaluate defendants' ability to pay \$30,000 in damages. (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 681; *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 917.)

A plaintiff is not entitled to a remand and retrial if he or she was provided a full and fair opportunity to present financial evidence. (*Baxter v. Peterson, supra*, 150 Cal.App.4th at p. 681.) After the close of evidence, plaintiff's counsel argued primarily about emotional distress damages. At the end of his argument, he made a brief request for punitive damages. The following colloquy occurred: "THE COURT: Before we spend time on punitive damages, there has been no evidence. I believe there always must

be evidence of the net worth of the debts in order for the court to impose punitive damages. So really, it's ten minutes to 4:00. I'm just trying to avoid opposing arguments on issues that really are not going to be before the court. [¶] [Plaintiff's attorney]: I understand. And given — Your Honor, given the amount that I'm requesting and the defendant's testimony concerning the 20 or more buildings, including apartment buildings, that she owns, I think the court has a sufficient basis to penalize the defendant by an award of punitive damages.”

Despite the trial court's suggestion that there was no evidence of defendants' net worth, plaintiff elected to argue her punitive damage claim based on the evidence she had presented. On this record, remand is not warranted.

DISPOSITION

We affirm the portions of the judgment awarding economic damages of \$3,150, emotional distress damages of \$60,000, and costs of \$987.55. The award of \$30,000 in punitive damages is reversed. The parties are to bear their own costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.